

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-1269

HAROLD HARRISON & CRAIG
HARRISON,

APPELLANTS

V.

KEITH CAPPS,

APPELLEE

Opinion Delivered April 29, 2009

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT,
[CV-06-568]

HONORABLE BILL MILLS, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Appellants, Harold Harrison and Craig Harrison, father and son, appeal from an order finding that they did not establish a prescriptive easement with respect to certain real property owned by appellee, Keith Capps. Capps filed a complaint seeking an injunction against appellants to keep them from using the road known as Alice Lane, which crossed his property, and which the Harrisons used to access their own adjacent property. The Harrisons counterclaimed, asserting that they had acquired a prescriptive easement over Alice Lane.¹ We affirm this fact-intensive case.

Our supreme court set out the standard of review for cases involving prescriptive easements:

¹In their counterclaim, appellants alleged ownership of two tracts consisting of 20 acres and 1.72 acres, respectively, and attached as an exhibit to the pleading a copy of a 1951 deed of conveyance to “N.W. Harrison.”

We first discuss our standard of review in [equity] cases. This court reviews [equity] cases de novo on the record but will not reverse a finding by the [trial] court unless it is clearly erroneous. *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000); *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Slaton v. Slaton, supra*; *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). It is this court's duty to reverse if its own review of the record is in marked disagreement with the [trial] court's findings. *Dopp v. Sugarloaf Mining Co.*, 288 Ark. 18, 702 S.W.2d 393 (1986) (citing *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Walt Bennett Ford v. Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426 (1981)).

Owners Ass'n of Foxcroft Woods v. Foxglen, 346 Ark. 354, 361, 57 S.W.3d 187, 191-92 (2001).

Testimony

By Capps's testimony, he and other persons originally acquired a fifty-acre tract by warranty deed dated September 16, 2005, but through subsequent title transfers he is now the sole owner. When he purchased the property and had title work prepared, he stated he found nothing of record that would give appellants the right to use the road, "Alice Lane," across his property. Capps testified at the time he purchased the property, there was a gate across Alice Lane "behind the barn"; he took that gate down but put another gate at Morris School Road. He testified that the public has not used Alice Lane since he acquired his property; that he gave Harrison² permission to use the road; that they had a written agreement, dated October 10, 2005, "because of the problems [Capps] was having at night with the traffic coming in all hours of the night." He stated that when Harrison signed the document, Harrison did not indicate that he had a right to use the road and did not tell him anything

²For identification, Harold "Gene" Harrison is identified herein by his last name, though brief reference is also made to Craig Harrison, using his full name.

“about having any permission from anybody to use the road.” Capps said that he did not coerce Harrison in any way to sign the agreement.

After the agreement was executed, Capps said he continued to have problems with trespassing at night, that “it was just non-stop traffic at night,” that he had some theft problems, and that he lost a renter because of the use of the road. As a result of those problems, he explained that he changed the lock on the gate, and he gave Harrison written notice of termination of the right of ingress/egress over his property.

On cross-examination, Capps testified that he did not know whether Harrison’s use of Alice Lane prior to Capps purchasing his separate property was permissive or adverse. He denied that his actions in refusing access over his land were designed to strengthen his bargaining power in trying to purchase Harrison’s property.

Larry Bennett testified that he sold the fifty-acre tract to Keith Capps; that he was aware Alice Lane was on the property; that Harrison was going in and out using that road to get to his property when Bennett bought it; and that he had “no idea whether [Harrison] had an easement to that property.” Bennett said that the subject of Harrison using that road never came up; that he did not give Harrison permission to use the road but that he never told him he could not; and that it did not bother him that Harrison used it. He did not remember whether he or Harrison put a gate up on the road but that the gate was “put up right past the barn.” Bennett was not aware of the public ever using the road.

On cross, Bennett testified that he owned the fifty-acre property for eleven or twelve years; that he bought it in December 1993 and sold it in 2005; that during that entire time,

Harrison used Alice Lane to access Harrison's adjacent property; that he had no problem with traffic going in and out; that he wanted to close the road to put cattle back there, but he did not close it; that both he and Harrison "maintained the road some"; that he had no memory whether the county graded the road some also; and that he had no independent knowledge about how Harrison used Alice Lane prior to the time that he (Bennett) acquired the property.

Further testifying on redirect, Bennett recalled starting up the road one day, and the gate was locked, preventing his entry; he had to go through the field to get to his property.

Herman Feltrop testified that he was familiar with the fifty acres owned by Keith Capps; that he takes care of the property owned by Margie Stark located immediately north of Capps's property; that his own house is down Morris School Road from that property; that he has lived out there for fifty years; that he is aware of Alice Lane; that he never knew of it being used as a public road; that he knew Harrison used it to access his property, but that he did not know what the basis of that use was; that he did not know if anyone ever gave Harrison permission to use Alice Lane or not; that there have been gates on Alice Lane; that one of the gates was about a hundred yards from Morris School Road, just the other side of the barn; that Harrison also had a gate at the end of the road that accessed his property. Feltrop did not know if Harrison had been accessing his property since Capps put the gate on Morris School Road, but Feltrop thought that Craig Harrison had ridden across Mrs. Stark's property; and he did not know if Craig Harrison had permission to cross Stark's property to get to his property.

On cross, Feltrop testified that he did not know if Harrison's use of Alice Lane was permissive or not, but that he did know Harrison had been using it for a long time; that Harrison built a house on his property and lived there at one point. He did not know how long the Harrison family had owned that property, but that when Harrison had a house on the property, Alice Lane was the road Harrison used to access his house. He testified there are other ways to get to the Harrison property besides Alice Lane and crossing Stark's property; that "it' comes off of Crosby and comes across Glass's land and then hits Stark's land"; and that he did not know whether that road had been used by the Harrisons to access their property.

Harrison testified that he owned a twenty-acre tract that touched Capps's property; that he was not aware of any dedication to the public or to the county of Alice Lane; that he had heard that it used to be an old county road; and that he did not have documentation either that it was ever declared a county road or that a previous owner of Capps's property gave him an easement.

Harrison testified about the succession of ownership of Capps's property. When the Harrison family bought the twenty acres, W.C. Welch owned the fifty-acre tract, and Welch allowed him to use that property. Welch sold to Mr. Handley, and Handley also allowed him to use the property. Handley sold to Stuart Dalrymple, and Dalrymple allowed him to use the property. Dalrymple sold to Bennett, and Bennett did not object to him using the property. He testified that until Capps, nobody cared; that Capps was the first to care; everybody else just let him use it.

Harrison also identified the agreement he signed with Capps. He stated that he understood what the agreement was when he signed it and that he had the opportunity to take it to an attorney. He knew it gave him permission to use the road and that it stated there would be a gate across the road. He stated the agreement allowed him to be given a key to the gate and confirmed that use of the road was restricted to him and whoever accompanied him. According to Harrison, his son (Craig) did go out there without him; he also testified he had heard the police were called out there, but he denied that Craig used the property to make amphetamine.

Harrison next acknowledged receiving the document that terminated his access over Alice Lane. He stated that after his access over Alice Lane had been denied, he had been going across Mrs. Stark's land with J.V. Kirk's permission; that there is no other access to his property besides Morris School Road; and that Crosby Road is three miles from his property. He testified that there has been a gate at the end of the road going into his property since 1951, when his family bought the property. He agreed that the road could be described as a field road.

On cross, Harrison explained that his dad bought the twenty acres in March 1951; that he (Harold) was four or five at that time; that since 1951, he has accessed the property by Alice Lane; that he never asked anyone permission to use Alice Lane; that he just used the road; that his dad used Alice Lane; that nobody objected; that he never thought anything about it. He stated that he used to work for the county; that he operated equipment such as road graders; that he also owned a road grader and used it to maintain Alice Lane; that

Handley owned Capps's property when he built the house on the property; that he put gravel on Alice Lane when he first put a house on the property; that he hauled creek gravel and put it on the road; that Handley did not object; that he did not ask Handley's permission to do so; and that he lived on the property for over twenty years and used Alice Lane to access it.

On re-direct, he testified that he did not tell Handley, Welch, Dalrymple, or Bennett that he was claiming the road against their interest; that he maintained the road and nobody ever said anything about him doing so; that he (Harrison) graded the road from Morris School Road all the way back to his house; that he never made a claim to any of the land owners that he was claiming the road against their interest.

On re-cross, he stated that he used the road in plain view during all normal times of the day; and used it daily for the twenty years that he lived out there.

Prescriptive Easement

In order to establish a claim of an easement by prescription, it must be shown that the use of a roadway has been open, notorious, adverse and continuous for seven years, with knowledge to the landowner that it was being used adversely. *Teague v. Raines*, 270 Ark. 412, 605 S.W.2d 485 (1980). Mere use of another's lands does not ripen into a prescriptive right unless the circumstances are such as to put the owner on notice that the property is being used adversely under a claim of right. *Id.* The use of unenclosed lands for passage is presumed to be permissive and not adverse. *Id.* The individual asserting an easement by prescription has the burden of proof to show by a preponderance of the evidence that use of the roadway has been adverse to the owner and his predecessors in title under claim of right for the statutory

period. *Id.* The determination of whether use of the roadway is adverse or permissive presents a fact question. *Id.* In *Jones on Arkansas Titles*, the author explains:

Where the entry is permissive, the statute will not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought home to owner's knowledge.

Possession, begun by an entry that was amicable or permissive, continues as it commenced regardless of its duration, unless there is explicit disclaimer.

Varn, *Jones on Arkansas Titles*, § 1513 (Supp. 1959) (citations omitted).

After a careful review of the testimony and the trial court's decision, we are not left with a definite and firm conviction that a mistake has been made in this case. Harrison contends that by continuous use over an extended period of time, he "clearly established that they used Alice Lane without the permission of Capps's predecessor in title for in excess of seven (7) years," thereby establishing that he had acquired a prescriptive easement over the property. His position, however, is belied by the fact that he subsequently signed the agreement presented by Capps. The agreement gave Harrison permission to use the road but restricted use of the road to him and whoever accompanied him. Harrison acknowledged that he understood what the agreement was when he signed it and that he had the opportunity to consult an attorney before signing it. Those are not the actions of someone claiming to have previously acquired the right to use the road by prescription.

Affirmed.

HENRY and BROWN, JJ., agree.